(4)

No. 89-1835

Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

KELVIN H. KEITH,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PAN AMERICAN WORLD AIRWAYS, INC. CERTAIN CLAIMANTS, MORGAN D. KING,
Respondents.

RESPONDENTS-CLAIMANTS' BRIEF IN OPPOSITION TO KEITH PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT *AND* TO KING "RESPONSE" IN SUPPORT OF KEITH PETITION

SANFORD JAY ROSEN
ROSEN & ASSOCIATES
ATTORNEY OF RECORD
155 Montgomery St.
8th Floor
San Francisco, CA 94104
Telephone: (415) 433-6830

JAMES C. STURDEVANT
STURDEVANT & STURDEVANT
A Professional Corporation
785 Market Street
Suite 500
San Francisco, CA 94103
Telephone: (415) 495-4940
Attorneys for Respondents-Claimants

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether, in a government enforcement action brought by the Equal Employment Opportunity Commission ("EEOC"), under the Fair Labor Standards Act, 29 U.S.C. §§ 216(c) and 217, charging violations of the Age Discrimination in Employment Act, 29 U.S.C. § 623 ("ADEA"), the EEOC may properly exercise its discretion by refraining from including Petitioner in the monetary provisions of a settlement, when Petitioner received and failed to respond to adequate and timely actual notice of the lawsuit?

PARTIES TO THE PROCEEDINGS BELOW

Respondents-claimants concur with Petitioner's statement identifying the parties to the proceedings below, but note that an objector, Morgan D. King, who filed an appeal from the District Court's Order Approving Settlement and Consent Decree, did not file a petition for certiorari. He has now filed a "Response" to the Keith Petition, which is untimely and otherwise violates this Court's rules, as addressed herein.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW . . . ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 5

JURISDICTION 6

RELEVANT STATUTORY PROVISIONS. 7

STATEMENT OF THE CASE. 7

REASONS FOR DENYING
THE PETITION FOR
WRIT OF CERTIORARI 18

I. The Petition for Writ of Certiorari Should be Denied Because Petitioner Keith, "Respondent" King and the Other Objectors Received Ample Actual Notice of the Litigation Well in Advance of the Trial and Settlement, Took No Steps to Assert Any Interests They Might Have, and Therefore Lack Standing to Assert Due Process Notice Rights or Raise Other Issues. . . 18

II. The Petition for Writ of Certiorari Should be Denied as the Ninth Circuit Has Not Decided Unresolved Questions of Federal Law that Ought to be Decided by This Court, Nor Has the Ninth Circuit Rendered a Decision Inconsistent with the Controlling Decisions of this Court. 20

III. The Petition for Writ of Certiorari Should be Denied Because, If it Were to Review this Case, the Court Would Have to Pass Upon Case-Specific Facts Pertaining, inter alia, to Whether in All the Circumstances of the Case, the Settlement Was Fair, Adequate and Just. 24

CONCLUSION 32

TABLE OF AUTHORITIES

Page

Cases

American Power Co. v. S.E.C.,
329 U.S. 90 (1946). 19

Carson v. American Brands, Inc.
450 U.S. 79 (1981). 25

EEOC v. Pan American World Airways,
622 F.Supp. 633 (N.D. Cal. 1985),
appeal dismissed, 796 F.2d 314
(9th Cir. 1986), cert. denied,
487 U.S. 1030 (1987). 8,29

Hansberry v. Lee,
311 U.S. 32 (1940). 21

Hoffmann-LaRoche v. Sperling,
___ U.S. ___, 107
L.Ed.2d 480 (1989). 21

Local 93, Ass'n of Firefighters v.
City of Cleveland,
478 U.S. 501 (1986) 24

Marshall v. Holiday Magic, Inc.,
550 F.2d 1173 (9th Cir. 1977) . . 25

Martin v. Wilks,
___ U.S. ___, 104
L.Ed.2d 834, reh'g denied,
106 L.Ed.2d 626 (1989). 21

Mullane v. Central Hanover Bank
& Trust Co.,
339 U.S. 306 (1950) 21

NAACP v. New York,
413 U.S. 345 (1973) 31

Officers for Justice v. Civil Service Comm'n.,
473 F.Supp. 801 (N.D. Cal. 1979)
688 F.2d 615 (9th Cir. 1982),
cert. denied, 459 U.S. 1217
(1983) 25

Pettway v. American Cast Iron Pipe Co.,
576 F.2d 1157 reh'g. denied,
581 F.2d 267 (5th Cir. 1978),
cert. denied, 439 U.S. 1115
(1979) 25

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 21

Schroeder v. City of New York,
371 U.S. 208 (1962) 21

Securities and Exchange Comm'n v. Randolph,
736 F.2d 525 (9th Cir. 1984) . . 26

Tyler v. Judges of Court of Registration,
179 U.S. 405, 410 (1900). 19

United States v. Armour & Co.,
402 U.S. 673 (1971) 26

United States v. ITT Continental Banking Company,
420 U.S. 223 (1975) 26

United States v. Reliable Transfer Co.,
421 U.S. 397 (1975) 18

Warth v. Seldin,
422 U.S. 490 (1975) 19

Whitmore v. Arkansas,
___ U.S. ___, 110 S.Ct.
1717 (1990) 19

Williams v. City of New Orleans,
729 F.2d 1554 (5th Cir. 1984) . . 25

STATUTES

28 U.S.C. § 1254(i). 6

29 U.S.C. § 216(c) i
§ 217. i
§ 623 (ADEA) i,2,7,10,12
14,16,27

RULES

Sup. Ct. R. 10 4
R. 13 6
R. 37.1 7
R. 37.2 7

No. 89-1835

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

KELVIN H. KEITH

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PAN AMERICAN WORLD AIRWAYS, INC.
CERTAIN CLAIMANTS, MORGAN D. KING

Respondents.

RESPONDENTS-CLAIMANTS' BRIEF IN OPPOSITION TO KEITH PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND TO KING "RESPONSE" IN SUPPORT OF KEITH PETITION

INTRODUCTION

Petitioner seeks this Court's review of a decision of the United States Court of Appeals for the Ninth Circuit sustaining final Orders of the United States District Court for the Northern District of California in this Age Discrimination in Employment ("ADEA") case, approving a Settlement Agreement and

Consent Decree (hereafter "Settlement Agreement"). This settlement had been negotiated, with the assistance of a settlement judge, among the United States Equal Employment Opportunity Commission (hereinafter "EEOC"), Pan American World Airways, Inc. (hereinafter "Pan Am") and attorneys and individual representatives of 63 of the 91 ADEA claimants, former Pan Am pilots who were named in the EEOC's Fifth Amended Complaint in this case. Beginning in late 1987, the liability issues were tried for 30 days to a jury. These respondents participated as litigating amici curiae at trial and as appellees before the Ninth Circuit.

On February 3, 1988, after all parties had rested at trial, and just prior to closing arguments, the EEOC, Pan Am and the 63 Respondents-claimants entered into the Settlement Agreement and

proffered it to the District Court. After extensive fairness proceedings it was adopted by the District Court and sustained on appeal.

The 63 Respondents-claimants respectfully request that this Court deny the Petition for Writ of Certiorari. No grounds exist for granting a Writ as: (1) the courts below properly made and affirmed findings of fact, based upon overwhelming evidence in the record not subject to re-review by this Court, that Petitioner Keith, Respondent King, and the other objectors below had adequate actual notice of the litigation long before trial and settlement; (2) the Ninth Circuit correctly held that Keith and King, and the other objectors, therefore, lack standing to present any due process lack of notice or the other legal issues; (3) Petitioner asserts no conflict between the

Ninth Circuit's decision and the decisions of any other Circuit courts, as there is none; (4) the decision of the Ninth Circuit does not conflict with any controlling decisions of this Court or raise an important unresolved issue of federal law that ought to be resolved by this Court; (5) the courts below correctly decided the legal issues involved; and (6) review of any issue in this case turns on the specific facts of this case, including inter alia those described under point (1), supra, as well as the facts that underlie the decision of the courts below that in all the circumstances of this case, the instant Consent Decree is fair, adequate and just. In short, there are no reasons under this Court's Rule 10, for the Court to review this case; and there is every reason not to do so.

Respondents-claimants have reviewed, are in general agreement with and adopt the Brief in Opposition of Respondent Pan Am. They submit this additional Brief in Opposition only to present their own interests in and perspective on this case.

OPINIONS BELOW

Respondents-claimants concur with Petitioner's statement regarding the opinions below, and incorporate by reference Petitioner's Appendix, which includes those opinions. Included in the Appendix to this Brief in Opposition is the District Court's November 3, 1988 Supplement to its June 17, 1988 Order Adopting the Consent Decree, which was not included with the Petition.

JURISDICTION

Petitioner invokes this Court's certiorari jurisdiction under 28 U.S.C. § 1254(i). Respondents-claimants do not dispute that the Petition is timely.

King's Response to the Petition, however, is neither timely nor appropriate. King is not a Respondent, as he does not oppose or "respond" to Keith's Petition and arguments, but is allied with Keith. King's Response also cannot be treated as a cross-Petition for Writ of Certiorari for the same reason. Plainly it is untimely as an initial Petition for Writ of Certiorari, for it was filed and served more than 90 days after entry of the Ninth Circuit's judgment. Supreme Court Rule 13. It also does not qualify as a brief amicus curiae in support of Keith's Petition, as it is not accompanied by any party's consent or accompanied by a

Motion for Leave to File. Supreme Court Rule 37.2. It also adds little or nothing to the Petition. Rule 37.1. King's Response, therefore, should be ignored. It is given only limited attention herein.

RELEVANT STATUTORY PROVISIONS

Respondents-claimants adopt the statement of relevant statutory provisions contained in the Brief in Opposition of Respondent Pan Am.

STATEMENT OF THE CASE

The EEOC filed this government enforcement action against Pan Am on September 15, 1981, alleging that Pan Am's policy towards its 60 year old pilots, who desired to continue flying after age 60 as flight engineers, violated the ADEA. The EEOC sought back pay, liquidated damages, reinstatement and injunctive and declaratory relief.

The general history of the litigation of this action is set forth in the District Court's decision adopting the Settlement Agreement, Petit. App. at 67-135, the Ninth Circuit's decision affirming, Petit. App. at 1-66, and in the District Court's prior reported opinion in this case, EEOC v. Pan American World Airways, 622 F.Supp. 633 (N.D.Cal. 1985), appeal dismissed, 796 F.2d 314 (9th Cir. 1986), cert. denied, 487 U.S. 1030 (1987).

Following two earlier settlement efforts that were rejected by the District Court, and two appeals to the Ninth Circuit, as well as a Petition for Writ of Certiorari, a Fifth Amended Complaint was filed by the EEOC on September 22, 1987, and trial was set for November 1987. Additional claimants who came forward to assert an interest in the lawsuit were

specifically added as claimants, as had been true in earlier versions of the complaint. Petit. App. at 15-16 n.1.

In the Summer of 1987, intensive but unsuccessful court-assisted settlement negotiations occurred. Jury selection commenced on December 2, 1987. On February 3, 1988, after both sides rested, and on the eve of closing arguments to the jury, Pan Am, the EEOC and the Respondents-claimants submitted the present Settlement Agreement to the District Court.

The Settlement Agreement provides for the payment of $17.2 million over a period of two years and eight months concluding on September 30, 1990 to: (1) the 91 claimants listed in the EEOC's Fifth Amended Complaint, (2) those of the additional 15 pilots who had recently reached age 60 and who otherwise

qualified to participate, and (3) other former Pan Am pilots above the age of 60, if any, who had filed similar ADEA charges against Pan Am with the EEOC or filed similar ADEA lawsuits against Pan Am. The Settlement Agreement also contains precise methodology for the distribution of monetary benefits to these identified claimants. Petit. App. at 72-74.

The claimants identified in the Settlement Agreement also had the right to reinstatement as flight engineers under the conditions set forth in the agreement; and all current and future Pan Am pilots were given the right to become flight engineers at age 60 and to continue flying after age 60. Id.

The Settlement Agreement also resolved the separate but related lawsuit brought by claimant Raymond Russell against Pan Am and the Airline Pilots

Association for alleged breach of the duty of fair representation and related claims.

Ten former Pan Am pilots opposed approval of the Settlement Agreement. After extensive briefing, followed by a fairness hearing, the District Court approved the Settlement Agreement in its June 17, 1988 Memorandum and Order. Petit. App. at 67-135. A Supplement to that Order was issued on November 3, 1989, denying one objector's Motion for Reconsideration. App. hereto at A-1 - A-8.

Only three of these objectors attempted to notice appeals: Kelvin H. Keith, Morgan D. King and William Thomas. Thomas' appeal was premature, was not re-filed and apparently was abandoned.

Keith and King, like most of the other objectors below, contended in the courts below that the Settlement Agreement

is unfair because: (1) they are not included as claimants who may share in the settlement damages fund; (2) allegedly they did not receive notice of their entitlement to pursue and enforce their claims in the litigation prior to public announcement of the Settlement Agreement in February 1988; and (3) their rights under the ADEA are extinguished under the Settlement Agreement.

The District Court addressed these contentions with great care and properly rejected each one. The District Court specifically found incredible Keith's, King's, and any other objectors' claims that they had no notice of this action until the Settlement Agreement was announced on February 3, 1988. Petit. App. at 84-97 (especially 88, 92-93 and 97 n.3), 121-22. The record fully substantiates these findings, which were

sustained by the Ninth Circuit. Petit. App. at 13-24 (especially 20-21), 55-57.

At the time of the 1988 settlement, this case had been pending for nearly seven years and the 1988 settlement was the third one proposed. Prior attempts to settle this case and their rejection by the District Court received broad media coverage. Petit. App. at 22-24. In addition, other airline carriers, including TWA, Western, United, American, Delta, Northwest and Continental, were sued for similar practices and the judgments and settlements in those cases were widely publicized. The instant case was also well publicized at and within Pan Am. Petit. App. at 13-18, 22-24, 55-57.

The District Court specifically found that the Petitioner must be deemed to have received notice of this lawsuit by a letter properly mailed by the EEOC to him

in June, 1982. Petit. App. at 85-88, quoting the EEOC letter, 121-122, 13-15.

The District Court also found that in 1981 Petitioner had received a newsletter mailed to each former Pan Am pilot. It contained a lengthy notice letter prepared by another claimant, Ray Egan. Petit. App. at 93-97, quoting letter; 17-19 quoting letter. Egan's letter provided detailed information about this lawsuit and urged any interested former Pan Am pilots to contact the EEOC about pursuing their ADEA claims against Pan Am in this case.

The District Court also found that King had falsely denied that he had not received advance notice of the lawsuit. Petit. App. at 91-92, 97 n.3, and 121-122. These findings too were affirmed by the Ninth Circuit. Petit. App. at 55-56.

On the basis of all this evidence, the District Court found incredible any claim that Keith or King (and other objectors) had not received ample actual notice of the lawsuit well before trial and settlement. Petit. App. at 88, 90-91, 97 n.3, 123-127. This finding was sustained by the Ninth Circuit. Petit. App. at 13-24, 55-56.

The District Court also correctly found that the 1987-1988 settlement negotiations leading up to the Settlement Agreement involved the rights of specific individuals to share in the settlement fund. Further, the EEOC and Respondents-claimants had settled only after assessing fully the value of the participating claimants' actual shares in the settlement fund, measured against known risks in continuing with the litigation. Petit. App. at 72-74, 98-99, as aff'd, 25, 28-29.

In addition to the 91 claimants listed in Exhibit A to the Fifth Amended Complaint, Pan Am insisted upon including within the monetary terms of the settlement all pilots it identified who retired between April 1, 1987, and January 31, 1988. The EEOC and the Respondent-claimants' insisted that any of the 15 new "potential claimants" listed in Exhibit C to the Settlement Agreement would have to meet appropriate conditions before he could share in the settlement fund.

The Settlement Agreement also included within its terms and protections any other Pan Am pilots who had filed similar ADEA lawsuits, or charges with the EEOC, and who were not already included among the 91 claimants and 15 potentially additional claimants. A side letter provided for a dispute resolution process concerning inclusion under the Settlement

Agreement of any such "charging party" or "plaintiff" identified. None was found.

As the District Court found, it was the settling parties' specific intent and understanding that no former Pan Am pilot other than those listed in Exhibit A, Exhibit C, or referred to in the side letter, would have any right to receive a share of the settlement fund. Petit. App. at 98-99. At the same time, as the District Court found, it was Pan Am's intent that the monetary fund for all claimants or potential claimants who reached age 60 prior to February 1, 1988 be limited to the $17.2 million provided for in the Settlement Agreement. Petit. App. at 99-100. The Ninth Circuit did not disturb these findings. Petit. App. at 28-29.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Petition for Writ of Certiorari Should be Denied Because Petitioner Keith, "Respondent" King and the Other Objectors Received Ample Actual Notice of the Litigation Well in Advance of the Trial and Settlement, Took No Steps to Assert Any Interests They Might Have, and Therefore Lack Standing to Assert Due Process Notice Rights or Raise Other Issues.

Based upon overwhelming evidence in the record, the District Court specifically found that Keith and King (and the other objectors) had received ample, actual notice of the lawsuit well before it was tried and settled. Petit. App. at 84-97, 121-22. These findings were adopted by the Ninth Circuit. Petit. App. at 13-24, 55-56. They are not now contested by Keith or King. Even if they were contested, they are not to be re-examined by this Court. See e.g., United States v. Reliable Transfer Co., 421 U.S. 397, 401 n.2 (1975).

On this record, the Ninth Circuit correctly determined that no due process lack of notice argument could be heard at the instance of an objector who had received actual notice. Petit. App. at 55-56. See also Whitmore v. Arkansas, ___ U.S. ___, 110 S.Ct. 1717, 1723, 1726 (1990).

Indeed, Petitioner (and King and the other objectors) also lack standing, for this reason, to raise any of the lack of notice contentions concerning hypothetical putative claimants who may not have received actual notice. See Tyler v. Judges of Court of Registration, 179 U.S. 405, 410 (1900); see also American Power Co. v. S.E.C., 329 U.S. 90, 107 (1946). See generally, Warth v. Seldin, 422 U.S. 490 (1975). That both courts below have determined that Keith and King (and other objectors) had

falsely denied receiving notice, also establishes that they have, in essence, "unclean hands".

For these reasons alone, the Petition should be denied. Given the history of this lawsuit, and the competing interests of the claimants who properly are entitled to receive benefits under the Settlement Agreement, it is not appropriate to grant review of the Ninth Circuit's decision at the instance of this Petitioner and his supporting "Respondent."

II. The Petition for Writ of Certiorari Should be Denied as the Ninth Circuit Has Not Decided Unresolved Questions of Federal Law that Ought to be Decided by This Court, Nor Has the Ninth Circuit Rendered a Decision Inconsistent with the Controlling Decisions of this Court.

Petitioner does not assert a conflict among the Circuits, because there is none. Petitioner asserts instead that the Ninth Circuit "has decided an important question

of federal law which has not been, but should be, settled by this Court, and that the lower court has decided the federal question in a way that conflicts with applicable decisions of this Court." Petit. at 18-19. Essentially, Petitioner relies on three decisions of this Court: Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Hoffmann-LaRoche v. Sperling, ___ U.S. ___, 107 L.Ed.2d 480 (1989); and Martin v. Wilks, ___ U.S. ___, 104 L.Ed.2d 835, reh'g denied, 106 L.Ed.2d 626 (1989). In his "Response", Mr. King relies on three additional decisions: Hansberry v. Lee, 311 U.S. 32 (1940); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); and Schroeder v. City of New York, 371 U.S. 208 (1962).

Keith and King are attempting, however, to bootstrap Keith's legal contentions out of the detailed and

controlling factual and procedural context of this case, in a desperate effort to create the appearance of jurisprudential significance. The lack of any conflict among the Circuits on any of the asserted questions of federal law itself demonstrates the need for further development in the Circuits before any such questions should be addressed by this Court, as well as the lack of significance of those questions. In any event, the decisions of this Court upon which Keith and King rely do not sustain Keith's asserted grounds for granting a Writ of Certiorari in this case.

Respondents-claimants rely on and adopt Respondent-Pan Am's Brief in Opposition with respect to the analysis of Mullane, Lee, Shutts, Schroeder, Sperling, and Wilks. Respondents-claimants would add, however, that given the record of

ample actual notice to Keith and King (and the other objectors and putative claimants) of this litigation long before trial and settlement, there was no due process violation by the EEOC in the manner in which or bases on which it included claimants in this lawsuit. Indeed, the record is replete with evidence that any potential claimant whose claim matured within the applicable statutes of limitations, and who sought inclusion in the litigation or to assert his rights before the EEOC or in court, was included in the lawsuit. Plainly, therefore, the EEOC exercised its enforcement discretion without invidious discrimination and in a wholly non-arbitrary and reasonable manner. It was not guilty of arbitrary or capricious selective enforcement.

III. The Petition for Writ of Certiorari Should be Denied Because, If it Were to Review this Case, the Court Would Have to Pass Upon Case-Specific Facts Pertaining, inter alia, to Whether in All the Circumstances of the Case, the Settlement Was Fair, Adequate and Just.

Respondent King makes an argument that the Settlement Agreement is not fair, adequate and just. King "Response" at 13-15. He is wrong.

Over the years, this Court has repeatedly emphasized the nature of consent decrees. "[They] bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts ..." Local 93, Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986) (citations omitted).

In deciding whether to adopt a settlement agreement as a consent decree,

the reviewing courts must decide whether under the circumstances present the settlement is fair, adequate and just. See, e.g., Officers for Justice v. Civil Service Comm'n, 473 F.Supp. 801, 803 (N.D. Cal. 1979), aff'd, 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1214, reh'g denied, 581 F.2d 267 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

Settlements, particularly of civil rights employment cases are favored. See, e.g., Carson v. American Brands, Inc., 450 U.S. 79 (1981); Williams v. City of New Orleans, 729 F.2d 1554, 1559 (5th Cir. 1984). Moreover, settlements sponsored by the government agency charged with the relevant enforcement function are especially favored. See, e.g., Marshall v. Holiday Magic, Inc., 550 F.2d 1173,

1178 (9th Cir. 1977); see also Securities and Exchange Comm'n v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984).

Giving appropriate deference to the judgment of the EEOC, the Settlement Agreement in the instant case thus appropriately was construed by the courts below basically as a contract, see United States v. ITT Continental Banking Company, 420 U.S. 223, 236-37 (1975).

The courts below also appropriately recognized that in addition to the precise terms of the Settlement Agreement:

> [R]eliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, ...
>
> Id., at 238.

The "precise terms" of the Settlement Agreement before this Court, United States v. Armour & Co., 402 U.S. 673, 681 (1971), state the number and

identity of the former Pan Am pilots on whose behalf relief was sought and whose rights to damages are secured in the settlement. The Settlement Agreement specifies the monetary relief to be made available to these "claimants." A total of $17.2 million constitutes these "claimants' damages." A precise formula is included for distribution of this settlement sum to the 91 claimants on Exhibit A, the 15 "potential claimants," listed on Exhibit C, and the possible other ADEA "charging parties" or plaintiffs.

In negotiating the provisions pertaining to the eligibility of the 15 persons listed on Exhibit C or possible additional ADEA plaintiffs or "charging parties", the EEOC and Respondents-claimants insisted upon other limitations on their entitlement and otherwise

satisfied themselves that the claims of those persons against the settlement fund would be further limited to the point essentially of being de minimus. Petit. App. at 72-73. By contrast, inclusion of Petitioner or any one of the objectors as a participant in the settlement fund would dilute the fund by more than the potential total dilution for all the persons listed on Exhibit C.

In agreeing to the settlement, the EEOC, the government agency charged with enforcement of the statute, and the Respondents-claimants made specific estimates of the range of the financial shares to be enjoyed by the claimants. They estimated that on average, each claimant listed on Exhibit A of the Settlement Agreement would get approximately $170,000. This constituted a substantial compromise of their

potential recovery, see EEOC v. Pan American World Airways, Inc., supra, 622 F.Supp. at 642. The EEOC and the Respondents-claimants had assessed the agreed-to recovery as being appropriate only for the identified claimants, given all the known risks in the litigation.

The negotiators for Pan Am made plain their intention to (1) limit the damages fund to the amount agreed upon, (2) to assure itself that all damages claims to be resolved by the Settlement Agreement would be satisfied against the specified fund, and (3) to preclude new federal damages litigation by other potential claimants who reached age 60 prior to February 1, 1988.

The settling parties did not overreach in protecting Pan Am from such persons. As the Ninth Circuit made plain, the Settlement Agreement in this case did

not extinguish any state law claims that Petitioner (or other objectors or potential claimants) may have. Petit. App. at 51, n.8. Thus nothing in the Settlement Agreement would preclude Keith or King (or other objectors or potential claimants) from recovering damages from Pan Am for any proven violation of state law not barred by applicable statutes of limitations or by other legal principles.

In the circumstances of this case, where the EEOC and claimants had carefully assessed the risks of continued litigation and the settlement value of the claims of the claimants listed in the Fifth Amended Complaint, the Settlement Agreement that resulted was fundamentally fair, adequate and just. These considerations included the EEOC's participation in the process, numerous risks concerning liability, previous failed settlement efforts, the

costs of further delay, and the risk that Pan Am could not satisfy a judgment.

In this light, and given Petitioner's and other objectors' failure after actual notice timely to come forward and pursue their claims in this litigation, exclusion of them from sharing in the damages does not render the settlement unfair, inadequate or unjust. Cf. NAACP v. New York, 413 U.S. 345 (1973). On the record of this case, exclusion of Keith, King, and the other objectors simply does not present an appropriate occasion for this Court's review.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted

SANFORD JAY ROSEN
ROSEN & ASSOCIATES
ATTORNEY OF RECORD

JAMES C. STURDEVANT
STURDEVANT & STURDEVANT
A Professional Corporation

Attorneys for
Respondents-Claimants

DATED: June 20, 1990

APPENDIX

[filed November 3, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)	
v.	)	No. C81 3636 RFP
PAN AMERICAN WORLD AIRWAYS, INC., et al., Defendants.	)	SUPPLEMENT TO ORDER APPROVING SETTLEMENT AND CONSENT DECREE
AND RELATED CROSS AND THIRD PARTY ACTIONS.	)	

Mr. Sherwood Myers ("Myers") objects to this Court's Order Approving Settlement and Consent Decree filed June 17, 1988. Mr. Myers contends that he should be a member of the settlement class because he retired from Pan Am due to its policy that formed the basis of this action and therefore is similarly situated to other claimants. Since he allegedly never received notice from the Equal Employment Opportunity Commission (EEOC) and because he wished to work as a flight engineer after age 60, he requests that the Court either include him in the class or

authorize him to pursue his claims independently. In light of the supplemental briefing and telephonic hearing of October 27, 1988 specifically directed to Mr. Myers' contentions, we approve the EEOC's decision not to include Mr. Myers as a claimant and deny Mr. Myers' request.

Mr. Myers voluntarily retired from Pan Am at the age of 58 in February 1986 and subsequently obtained employment as a pilot at United Airlines where he is currently employed. Following certification as a flight engineer, Mr. Myers now earns more at United than he would have had he stayed at Pan Am. Mr. Myers claims that he has been injured since he is based in New York rather than Miami and thus loses "substantial number of useful days each year commuting with accompanying hotel and travel expense."

The parties to the settlement also note that hundreds of Pan Am pilots had transferred to United when Pan Am sold its Pacific air routes to United in 1985.

Mr. Myers first notified the parties to this action that he believed he might be entitled to share in the settlement in February 1988 -- two months after the settlement had been agreed upon. Letter of Sherwood Myers to David Kelley, February 29, 1988. After Mr. Myers clarified his reasons for objecting to the settlement, both the Pan Am and the claimants responded that Mr. Myers should not be entitled to share in the settlement since he was not 60 when he retired and since he gained more rewarding employment as a United flight engineer. After this Court requested further briefing on Mr. Myers' situation, the EEOC further noted that Mr. Myers does not meet the criteria

to be a claimant in this case and would not have included him as a claimant even if they had been notified earlier of his situation.

As we explain in our June 27 order incorporated by reference here, the EEOC has broad discretion in conducting enforcement actions. See, Order Approving Settlement and Consent Decree at 23-24. It can extinguish private causes of action, shape the nature of the relief sought and administer the distribution of any settlement or award. It cannot be compelled to sue on behalf of an individual, nor must it permit individuals to intervene. Its representation is presumptively adequate. Its discretion in conducting ADEA enforcement actions is bounded only by the constitutional requirements of due process.

In the current instance, the EEOC

actions meet the requisite standard of reasonableness. The Consent Decree and Settlement Agreement applies to retired Pan Am pilots who were the subject of "actions taken by defendant Pan Am which are alleged to be in violation of the ADEA." Agreement at 1. As the EEOC pleadings clarify, the EEOC therefore sought claimants who would have continued as Pan Am employees past age 60 but for the Pan Am policy. Understandably, almost all of these were pilots who had retired at or after the age of 60 since those who retired earlier would have to demonstrate a far greater nexus between the policy and their retirement.

Mr. Myers has been able to point to only one person who retired under the age of 60 who became a claimant. That individual, Capt. Brons, retired eight months before reaching 60 rather than

undergo extensive additional training necessary to stay qualified to fly during those months. The EEOC included Capt. Brons based on his express representation that he otherwise would have continued flying until the Pan Am policy would have forced his retirement. Declaration of Fritz Wollett at 2. In contrast, Mr. Myers has produced no evidence that indicates he would have continued but for the challenged policy. Mr. Myers' decision can be quite legitimately seen as a desire to pursue the greener pastures of employment at United. The EEOC notes, for example, that Mr. Myers did not pursue a program initiated in 1983 that permitted pilots approaching 60 to transfer to the flight engineer's position. Although the EEOC did not specifically determine that Mr. Myers would not have been included as a claimant until after the class was

approved, we find that under EEOC criteria he would not have been so included and that such an exercise of the EEOC's discretion would have been patently reasonable.

In light of the above conclusion that Mr. Myers would not have been a member of the class, we need not discuss whether his failure to receive notice was constitutionally deficient. Nonetheless, we point out that Mr. Myers acknowledges that he had knowledge of these proceedings far in advance of the Agreement and Settlement Decree. As we have noted in our June 17 Order, the record demonstrates that knowledge of this lawsuit was widespread throughout the airline industry. Other claimants who did not receive notice contacted the EEOC and requested to join the litigation. Especially as an attorney and a member of

the Florida bar, Mr. Myers knew or should have known to contact the EEOC or other authorities in order to preserve his rights.

IT IS SO ORDERED.

Dated: November 3, 1988

/ Robert F. Peckham
Chief United States
District Judge